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In the Supreme Court of the United States.

OCTOBER TERM, 1889.

WILLIAM H. ROBERTSON, LATE COLLECTOR of the port of New York, plaintiff in error,
vs.
THE FRANK BROTHERS COMPANY.
No. 15.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF FOR PLAINTIFF IN ERROR.

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STATEMENT OF CASE.

This action was brought to recover an alleged excess of duties paid to the collector at the port of New York.

These duties were paid upon a number of importations of bananas in 1881 and 1882. The contest is, therefore, under the law as it stood then.

The only duties in question are those imposed upon certain "transportation and labor charges," (p. 7) which were added to the invoices.

It appears that several times *prior* to the importations in question, the appraiser had added to the importers' invoices an amount for "shipping charges," and a sum for "transportation charges," and had imposed a penalty upon the importers for not stating these amounts themselves.

When plaintiffs below made entry of the goods in question, there was nothing said upon this subject, but the plaintiffs themselves, and of their own volition, wrote these "additions" in their invoices in each instance, in this way, viz: "Shipping charges added as required by the appraiser," etc., and "Transportation charges added as required by the appraiser," etc.

The appraiser, upon receipt of each paper entry, and after examination of the goods, indorsed thereon, "Value correct, with importers' addition." The paper, with these additions in it, thus indorsed, went to the collector. The importer having figured up the duty, gave the money for the amount in each case to a broker (one Hait), who paid it to the collector. Hait made such payment without a word of comment, complaint, or explanation (p. 21, marginal page 53), and, so far as appears, no other or additional payment was ever made or required, nor was any protest filed till some time after the goods were taken away.

The trial judge left it to the jury to say whether these challenged additions were voluntarily made by the plaintiffs below, or under compulsion; and also, whether these additions were proper. The jury found for the plaintiffs.

SPECIFICATIONS OF ERROR.

The court erred in denying defendant's motion that the jury be directed to find for the defendant, (1) on the whole case, and (2) on the *transportation charges*, (p. 39, marginal page 86), which was the principal amount in dispute (p. 43, marginal page 97).

The court also erred in not charging defendant's fourth request (p. 39; marginal page 87), which the court refused to charge, except as charged (p. 44; marginal page 98).

Also in charging, as shown on pages 44 and 45 (marginal pages 99 to 102).

Also in its definition therein as to compulsion, excepted to specifically on page 45 (marginal page 101).

All the foregoing specifications of error bring up the legal proposition discussed hereinafter in Point I.

The court also erred in permitting the importer (Frank) to testify that Aspinwall was the principal market of the country of exportation, against defendant's objection that it was immaterial, and that it was for the appraiser to determine what the principal market was, which ruling was excepted to (p. 8).

Also in refusing to charge defendant's requests Nos. 1, 2, and 3, excepted to on page 44.

Also in submitting to the jury the question as to whether Aspinwall was the only market, or, if there were other general markets in the country (pp. 40, 41), excepted to (p. 44; marginal page 98).

Also in charging the jury that it was for them to determine what was the principal market of the United States of Colombia at that time (p. 46).

These specifications of error bring up the legal proposition discussed in Point II.

Point III is raised by the general request in the first specification of error above given.

BRIEF OF ARGUMENT.

I.

The importers made these "additions," not under compulsion or duress of property, but *voluntarily*, for the purpose of bringing this suit, and hence were not entitled to recover.

A. The *evidence* shows this, without contradiction, when it is carefully analyzed.

All the *material* evidence bearing on this question will be found between pages 16 and 22 (marginal pages 44 and 56).

There are loose phrases appearing in other places, to the effect that the appraiser *made* the addition, as at page 10 (marginal page 31), and also to the effect that the additions were *required* by the appraiser, as at pages 10, 11, 16, 32; but plaintiff Frank is the *only* witness who uses the expressions, and on his cross-examination it appears that such phrases do not refer to *these* but to *prior* shipments. (See hereafter.)

By reference to page 16 (marginal page 44) it will be seen that one Hait, as attorney for plaintiffs, made the entries and paid the duties (p. 12; marginal page 36), and that "such entry when presented to the collector contained" the items in dispute, namely, "Shipping charges added as required by the appraiser," and "Transportation charges added as required by the appraiser" (p. 17; marginal page 45). Upon each the appraiser indorsed his return in the following words: "Value correct, with *importers'* addition" (p. 17; marginal page 46). It was admitted in the case that each entry and invoice "when *presented* to the collector" contained similar additions "and that the appraiser's return upon *every* invoice" was indorsed on the same, and in the same words.

By reference to page 18 (marginal page 47) it appears that the plaintiff, Frank, himself "caused these additions" to be put on.

On Frank's cross-examination, commencing on page 19 (marginal page 50), it appears that all he meant by his evidence about being *required* by the appraiser to make these additions was, that he had been required on *prior* importations to make such additions. His testimony upon this question is as follows (p. 19, marginal page 50):

> Q. You say that he required you to make these additions to your entries?
>
> A. He did; if I did not make them he would add an additional penalty.
>
> Q. When did he require you to do that in that way?
>
> A. That was a considerable time prior to this.

Q. *Prior* to *these* importations?

A. Yes, sir.

Q. How long should you say?

A. I should judge about *three* or *four* months.

Q. Three or four months before the first of these importations?

A. Yes, sir.

Q. Did he tell you if you did not make these additions that he would add them for you, and it would carry a penalty?

A. Yes, sir; he did so repeatedly.

Q. And on *those* importations *in which you have not made* the additions he made them and the penalty was added?

A. Yes, sir.

And on pages 20 and 21 he further testifies:

Q. *That is what you mean* by saying that you were required to make the additions on these invoices and entries required by the statement that the appraiser considered that those items ought to be paid, and if you did not add them he would add them, and that would carry a penalty?

A. Not alone that; but I knew from my own experience. The entries made prior to this, the additions and penalties were so heavy I *felt* required to do so.

Q. The statement, and the fact that in cases of early importations the additions were made and penalties added is what you mean by saying that you were required, in respect to these importations, to make these additions in your entries?

A. I knew from the appraisers by conversation that *unless* I made the addition he *would* make them for me, and add, in addition, a penalty.

Q. That is, *from what had taken place in other cases?*

A. Yes, sir.

Q. But you did not know it in regard to this particular importation? He did not make reference to any one of *these particular importations?* At the time he made this remark you did not see him, did you?

A. I *saw* him right along that time. I *can not point out any* on the entry. I was constantly having this information, and I desired to make it conform with his ideas on the subject. (Pp. 20 and 21; marginal pages 52 and 53.)

From this testimony it appears that the plaintiff Frank made these additions himself (just as the appraiser's indorsement said he did, p. 17, marginal page 46) because he "*felt* required to do so" (p. 21); and because they had a number of previous entries which had been expensive, and he thought he would test his original mode of entry, (p. 18); and because he believed that if he did not do it the appraiser *would*, and add a penalty (p. 21); and (as he says at the top of page 54) "he considered it safer and better to come up to the conditions of the appraiser," and at page 22 (marginal page 54) again, "I considered it was safer and better to come up to the conditions of the appraiser, and *protest and appeal.*"

It is submitted that, under this evidence, there was nothing for the jury on the question of compulsion. It is undisputed that he made these additions himself voluntarily, for the purpose of getting himself in position to bring this action and test the question.

It is evident that he, of his own volition, put in these

additions by virtue of the privilege given him in section 2900, Revised Statutes, and *with it directly before his eyes.*

It is believed that the trial judge failed to properly distinguish between testimony as to what occurred at the time of *prior* importations and as to what occurred at the time of the entries in question.

There is no evidence that anything whatever was done by the appraiser, collector, or other officer at the time of *these* importations to compel, or even to induce, the plaintiffs to make these additions, and the question should not have been left to the jury.

B. Under this evidence, the case of *Haas* vs. *Arthur*, 14 Blatch., 346, if accepted by this court, will be found conclusive.

In that case the plaintiffs made the additions to the invoice, "accompanying the act by a protest," and to "prevent the seizure of the merchandise." Upon entering similar merchandise before, the appraiser had made the addition, and the goods had been seized for forfeiture, and "to avoid such a result in the present entry," plaintiffs made their own additions under protest, and sued the collector to recover the excess of duty caused by such addition.

Wallace, J., held that plaintiffs had only two courses to pursue—one, to let the appraiser fix the value, and, if too high, appeal; and the other, to fix it themselves. They did the latter. The learned judge remarks: "The plaintiffs *could not* qualify the effect of their act in adding to the value in the invoice *by assigning the reasons* which induced them to do so."

C. Under this evidence there was nothing which *the law will recognize* as coercion or duress of person or property.

It does not appear that there would be, or even ever had been, a detention of goods (pp. 21 and 22; marginal pages 54 and 55), or that the importers feared seizure, for there could be no forfeiture of goods (18 Stats., 189, section 114, in force in 1881 and 1882). All, apparently, that could happen was "delay in liquidating" and the possible imposition of a penalty. The mere delay in liquidating would not constitute duress or coercion so long as plaintiffs got their goods, which they uniformly did (p. 22; marginal page 55).

The only question in this case, therefore, is whether the *anticipated* danger of the *wrongful* imposition of a penalty is sufficient to constitute a legal duress or coercion.

The general rule upon the question whether a payment is voluntary or otherwise is stated by the Court of Appeals of Maryland, in *Mayor etc., of Baltimore* v. *Lefferman*, 4 Gill (Md.) 425, as follows:

> A payment is not to be regarded as compulsory unless made to *emancipate* the person or property from an actual, existing duress, imposed upon it by the party to whom the money is paid.

This rule is accepted in *Radich* v. *Hutchins*, 95 U. S., 210, 213.

Is there anything to show that the officers of the Government subjected the plaintiffs below to any coercion or duress within the above rule? If not, it should not have been left to the jury.

III.

The evidence shows affirmatively that the plaintiffs below did not make payment "*in order to obtain possession* of their merchandise."

Under the statute which gives the right to sue the collector (R. S., sec. 3011) it has been held that the payment must not only have been accompanied by a protest, but also it must have been "made to obtain possession of the merchandise." (*Porter* v. *Beard*, 124 U. S., 429; *United States* v. *Schlesinger*, 120 U. S., 109.)

The evidence shows, and it is undisputed, that the importers did not make payment in order to obtain possession of the goods. They received the goods whether they made the additions or not, only there was delay in liquidating. Three questions and answers show just this, and there is nothing to contradict it, so far as we have been able to discover.

> Q. You say that you get your permit just the same whether these additions were made on the invoices or not; that is, that had been your custom?
>
> A. Yes.

(Page 21, marginal page 54.)

> Q. You had your goods before the liquidation?
>
> A. Yes, sir.
>
> Q. Merely a question of finding out what was due on them after that?
>
> A. Yes, sir; *that is all.*

(Page 22, marginal page 55.)

It appears that there were nine entries, on nine different days—the first, October 8, 1881; the last, November

3, 1881 (p. 4, marginal page 13). Payment was made on each on the day of its entry, and no other or different payment appears to have been made; and it is admitted (p. 17, marginal page 46) that the collector "liquidated the duties" upon these figures, and one protest was filed for all, January 6, 1882. (See dates of entry, dates of paying, and dates of protest, in bill of particulars, pp. 4 to 18, marginal page 48.) The subsequent entries, etc., complained of, appear in the same way. And thereafter the merchandise was uniformly delivered to, and taken away by, the importers.

Hence, we insist that it appears affirmatively that the importer did not make payment in order to obtain possession of his goods.

IV.

It is respectfully submitted, that the plaintiffs below are *estopped* by their own acts from recovering in this case.

They write the "additions" themselves in these nine entries and invoices (and in several subsequent ones), present them one after another to the collector, permit the appraisers after examination to indorse on each his statement that the "additions" are the "importers'," see the duty figured up upon such additions, and, without objection, complaint, or comment, pay such duty, obtain their goods, and take them away.

Why are they not estopped from now complaining?

The fact that they file the statutory protest some days

after the payment of duty upon the last entry, and after they have obtained their goods, and after (being perishable fruit) they have doubtless sold and disposed of them, can in no way change the application of the familiar rule of estoppel.

O. W. CHAPMAN,
Solicitor-General.

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NO. 15.

WILLIAM H. ROBERTSON, late Collector of the Port of New York,

Plaintiff in Error,

vs.

THE FRANK BROTHERS COMPANY,

Defendant in Error.

BRIEF AND ARGUMENT FOR DEFENDANT IN ERROR.

TREMAIN & TYLER,
146 Broadway, N. Y.
W. B. COUGHTRY,
33 Pine Street, N. Y.
For Defendant in Error.

C. G. Burgoyne's Printing Business, 146-150 Centre Street, N. Y.

Supreme Court of the United States.

OCTOBER TERM, 1889, NO. 15.

WILLIAM H. ROBERTSON,
Late Collector of the Port of New York,
Plaintiff in Error,

AGAINST

THE FRANK BROTHERS COMPANY,
Defendant in Error.

BRIEF AND ARGUMENT FOR DEFENDANT IN ERROR.

Statement.

The plaintiffs below recovered (Rec., fol. 21) a verdict of $2,259.74, part of the total claim of $2,584.97 (see Rec., fol. 44), for alleged illegal duties paid under protest to the Collector of the Port of New York, who is the plaintiff in error here. The importations were bananas, which were subject to an *ad valorem* duty. The controversy did not concern the rate, but the *amount* upon which the duty was to be calculated. The Government had included in the total amount upon which duty had been assessed certain alleged excessive amounts as *charges*. which, as the jury found, were either fictitious or else had already been included in the amount upon which

the duty was paid. The importations were from Aspinwall, United States of Colombia, by various vessels during the years 1881 and 1882 (Record, fol. 12). The charges in question were transportation and labor charges incident to the shipment of the goods (bananas) aboard the vessels in which they were exported from Aspinwall. Plaintiff contended that he should pay duty only upon such *actual charges*, and that duty upon them should be paid but once. As to the inland transportation charges, the plaintiff contended that there were none, and that the merchandise was not subject to any inland transportation charges, because the actual market value of the imported merchandise in the principal markets in the country from which it was imported always included such inland charges, and that there was only one principal market of the country of exportation at which there was any market value, and that that was Aspinwall ; so that all inland transportation charges of bringing the bananas to Aspinwall would always be included in the market value at Aspinwall. The plaintiffs established the fact, and the jury have found that Aspinwall was the principal and indeed the only banana market of the country of exportation ; and that all inland transportation charges were included in the market value of bananas at that place.

These contentions were opposed by the Government on substantially two grounds—*first*, that the findings of the appraisers as to what were proper and dutiable charges could not be inquired into judicially ; and, *second*, that if the appraiser had concluded that Aspinwall was not the principal market of the United States of Colombia, his opinion was also final and conclusive.

In addition to these propositions of law, the Government further sought to establish by testimony that the charges upon which duty was calculated were not fictitious, and were proper and reasonable, and that Aspinwall was not the principal market of the United States

of Columbia for bananas; but in both of these contentions of fact the Government failed, and the jury found for plaintiff.

THE PROOFS in brief tended to show that the plaintiff corporation "was engaged in the importation of bananas from the Port of Aspinwall, in the United States of Colombia, to New York; and that these bananas were shipped at various times in 1881 and 1882 by the steamers of the Pacific Mail Steamship Company and the Atlas Line, and "that certain shipping charges for handling the bananas before they were finally stored in the hold of the vessels were paid for by the plaintiff upon each of the several cargoes" (Rec., fol. 26). The ships by which goods were imported "frequently left the port of shipment after the consular office in that port had been closed for the day; and, in order to send invoices which would be certified by the Consul with the goods, it was necessary to *estimate* the charges that had been incurred before the report of the actual expenses was received." These estimates approximated so closely to the actual expenses, that "in all cases the estimated charge stated on the invoices sent with the goods of four cents per bunch for the large, and two cents for the small, bunches *exceeded the actual expenses.*" The bananas came in part from the surroundings of Aspinwall and in part from different stations lying along the line of the Panama railroad, and in making up their said estimated charges nothing was ever added to cover the cost of bringing the fruit to Aspinwall (Rec., fol. 27). Such charges, as the jury have found, were included in the price. After the steamers had sailed the laborers were paid, and the amounts so expended constituted the *actual charges.* The account of these actual payments did not accompany the goods, but arrived in New York by subsequent steamers. The shipments of fruit as they arrived in New York were severally accompanied by an estimated invoice, certified by the Consul, upon

which entry was made at the New York Custom House.

The estimated charges stated in these consular invoices were upon the basis of four cents per bunch for the large, and two cents per bunch for the small bunches, and were not satisfactory to the New York officers. "The appraiser added to that enough to make up five cents per bunch all around, and furthermore he added the inland transportation charges" (Rec., fol. 31). "The invoice represented a certain number of large bundles and small bundles and charges were based upon that amount with the amount as corrected by the number of bundles large or small that was landed." The duty was paid accordingly, and charges being "figured five cents a bunch and also the freight charges; the inland freight charges were figured the same way" by the appraiser (Rec., fol. 32). This principle of calculation was illustrated at considerable detail in the proofs, which need not be analyzed here, as these proofs satisfied the jury. They were also summarized by the Court in its charge at the foot of page 43 of the record. The plaintiffs claimed that they had paid more than they ought to pay by $2,584.97 (see Rec., fol. 44), of which sum $2,059.79 is for inland transportation, and $199.95 for labor charges. "That is, the plaintiffs claimed that they paid for labor to take the bananas off the railroad cars and put them into the ship a sum so much less than the Collector assessed them for, that the duty on it would be $199.95, including the interest; and the plaintiffs claimed they paid duty on transportation charges more than they ought to $2,059.79" (Rec., fol. 97 and fol. 44). The appraiser told the plaintiffs that they were required to pay duty on inland charges, and imposed penalties in a number of cases for not doing so, and compelled plaintiff "by sheer force to submit, because the amounts were running up to very large figures," so that plaintiff put these charges on, as required by the appraiser, under

protest. The Government said, "Our estimated charges were entirely too low," and that "five cents per bunch was low enough." Plaintiff figured at that amount, and proposed to test the case, but the Government put upon plaintiff "penalties and additions," so that finally plaintiff gave in and paid under protest (Rec., fol. 35); while at the same time plaintiff was obliged to make his invoices and entries in this way in order to get permits to land the goods, and to have the invoices passed or else be subjected to penalty and great delay. Delay was fatal as the fruit was perishable. There was no practical way by which the plaintiff could resist or test the right or authority to put those additions on and at the same time conduct business (Rec., fols. 54 and 55). The plaintiffs were told that if they "did not make these additions" that the revenue officers would add them, and this would carry a penalty. This threat was repeatedly made, and on those importations in which the plaintiffs had not made the additions the penalty was added, together with additions for these charges (Rec., fols. 50, 51).

The principal market of the country of exportation was proven by plaintiff to be "Aspinwall, which in this case was the port of shipment" (Rec., p. 8). These bananas were purchased from different country people along the line of the Panama Railroad and across the bay, and at distant ports, who sent them to Aspinwall, some being brought there by cars, others by boats, and others by horseback; and the invoices then made up at Aspinwall stated the price plaintiff there paid (Rec., fols. 73, 74 and 75). There is no expense of transportation; planters themself bring them to the wharf, and the shipment charges are added. All transactions were in Aspinwall, and the bill of lading ran from Aspinwall. They were bought at the same price, "whether they were delivered by the railroad or not," they were paid for at Aspinwall; all the deliveries were

at Aspinwall, and *the price was fixed according to Aspinwall prices* (Rec., fol. 76). The price in Aspinwall is the uniform price, although the price varies at different seasons. From Aspinwall there were two lines of steamers. Plaintiff paid for the bananas just the same at one place as at another. "The aggregate amount was alike; it was the Aspinwall price" (Rec., fol. 84).

The principal place in that section of the country is Aspinwall, which is the only port of exportation of any kind, and the only town on that side of the Isthmus. There are no other places of any importance having any banks, exchanges or general mercantile offices. Aspinwall is the place of the country where "merchants settle their accounts and conduct their transactions;" and, indeed, the only place where merchants consummate their businsss and make their payments. It is the only place of commercial importance (Record, fols. 62 and 63). Moreover, the plaintiffs were the only wholesale dealers in bananas at Aspinwall.

The slender testimony which the Government offered against proofs of this tendency touching the principal market of the country was from witnesses who had not personal experience (Rec., fols. 58 and 65), and whose commercial transactions did not afford them any information to controvert the state of facts in these respects established by the plaintiffs (fols. 68 and 69). The Government further *claimed* that no particular place was taken as the principal market and "that Aspinwall was not considered by the appraiser in making the appraisement to be the principal market of the country, but only as a port of shipment" (Record, p. 23). The Government, therefore, excepted to the charge of the Court that under the circumstances the jury might find "what was the principal market of the United States of Colombia" at the time of the exportation in question (Record, fol. 103).

There were some minor disputes in the testimony as to whether some of the charges for inland transporta-

tion were in some instances paid by plaintiff or were included in the Aspinwall price; but these differences were slight, and could only affect the amount of the plaintiff's recovery in respect to them. This amount being in dispute has been settled by the jury, and need not be dissected upon this writ of error. Moreover, the issue in respect to the figures for a verdict was properly presented to the jury by the charge of the Court, and there appears no exception on this topic.

The learned Justice below aptly explained to the jury what upon the evidence it was their duty to ascertain. It was explained that if "there was only one market of the country at which there was a market value, and that was Aspinwall," and that if "the market price there would always include the charges for bringing bananas there, then the *charges would be in once* and *should not be put in again.*" If, however, there were other general markets in the country, so that the market price at Aspinwall "did not include those charges, then they must be added." That was a question of fact to be decided "on the evidence we had in the case."

The Exceptions

relate to the defendant's objections to receiving the body of the foregoing testimony and to the refusal of the Court to rule in such a way as to render the facts established of any value towards a recovery. At the close of the plaintiff's case and before the defendant had adduced any testimony, the claim was made that no cause of action had been shown, and that the verdict should be directed for the defendant. In making the motion at this point, however, the Government did not pretend that all the testimony in the cause had been taken; and as the testimony in fact was not closed, the Court was not bound to direct a verdict. The defendant having thereafter introduced evidence, this excep-

tion may be passed by (Rec., fol. 56). When all the evidence had been closed, this motion for a direction for the defendant upon the whole case was renewed and denied by the Court, and an exception taken (Rec., page 39). The propositions of law which the defendant relied upon to defeat the plaintiff's recovery were then submitted as stated at page 39, and thereupon the Court charged the jury.

THE CHARGE is given in full in the record from page 40 to 46; and in substance leaves to the jury to determine what place was the principal market of exportation, and whether the cost of transportation to that place was or was not included in the value of the bananas at that place; and whether there was any expense of transportation in addition to the wholesale price or actual market value in the principal market of the country of exportation; and whether there were any other expenses for labor incident to the transportation and shipment of the bananas from Aspinwall additional to those stated by plaintiffs; and whether plaintiffs' additions for labor charges and transportation charges, as made by them in order to get their permit to land and to obtain possession of their goods, were made freely or under duress and compulsion; and whether the consequent payments made by plaintiff were therefore paid voluntarily or under coercion and protest.

The fairness with which these issues were presented will be obvious on a perusal of the whole charge. As a result of such perusal it will further be observed that if the case was to be submitted at all by the Court to the jury, it was submitted in a manner most favorable to the Government. Indeed, the requests of the Government to charge seem to be embodied in the instructions actually given, in so far as it was possible to embody those requests and at the same time submit any issue to the jury.

The substance of the four requests state the chief

reasons why the Government claimed that nothing should be passed upon by the jury. If the requests go farther than this, they are covered by the charge. The exceptions to the charge proceed upon the same theory that the substantial issues ought not at all to have been left to the jury.

The Issues.

There seems to be no dispute between the parties that duty is to be paid at the rate of ten per cent. upon the *wholesale price* in the principal market of the United States of Colombia, together with ten per cent. upon such *charges*, in addition to such market value as were *actually incurred* by plaintiffs in placing the bananas in question on board the exporting vessels. Such duties the plaintiffs were willing to pay and did pay. The plaintiffs' claim was that duties were exacted at least to the amount of the verdict in excess of such a basis. The *Government claims* the right to fix this excess conclusively against plaintiff *by appraising these transportation and labor charges* as constituting a part of the wholesale price or actual market value in the *principal market* of the country of exportation; and for that purpose to shift at will the *place* of and price at that principal market. This contention of the Government was not sustained by the Court below; and no administrative purpose can be assigned for the prosecution of this writ of error, unless that prosecution signifies an attempt on the part of the Government to procure from this Court an adjudication denying the importer's right to review an appraisement conducted on an alleged illegal basis, or an appraisement of factors which are not by statute made the subject of appraisement.

The plaintiff claims that it is no part of the duty of *appraising* officers to *appraise* inland transportation

charges, labor or shipment charges, lighterage charges, or other incidental expenses actually incurred in the shipment of goods. Such items are to be assessed, if at all, in accordance with the *actual facts* in respect to them in any particular case; and duty upon such dutiable items is to be paid but once, and then only upon such *actual* expenditures, and no more; and that the Court should ascertain by evidence, like that adduced in this case, what such items actually amount to, and whether duty had been paid upon such items more than once. In this inquiry the Court is not precluded by the appraiser's actions.

This is the issue fairly stated, as presented upon this writ of error.

If the Government, however, is right, this importer would be without remedy for the payment of part of his duties *twice* instead of *once;* and the menace of the customs officer that he would appraise and levy in accordance with his own notions, would become a substitute for the acts of Congress specifying the subject matters for appraisements, and what shall be added thereto, and the rules by which duties shall be assessed and values for that purpose ascertained.

POINTS.

I.

The amounts upon which the *rate* of an *ad valorem* duty are to be asssessed are *measured by statutory limits.*

The *rate* is valueless as measuring the quantum of payment if the *value* to be rated be unsusceptible of exact definition. It would be futile for Congress to deliberate about *rates* if ratable values might depend

on official caprice. Hence divers statutory provisions carefully prescribe the factors constituting the total *amount* upon which an *ad valorem* rate is to be imposed; and any alleged violation of these statutes is, of course, judicially ascertainable.

1. For the purposes of this case the two leading factors constituting such amounts are, (1) "The actual market value or wholesale price" of the imported merchandise "at the period of its exportation" and "in the principal markets of the country" of exportation. This is to be appraised. (2) The addition to *such appraised value* of certain expenses of transportation or shipment, and commissions, and packing and coverings, and "all other actual or usual charges for putting up" and shipping. These additions depend upon the facts in each case, concerning which, however much the appraiser's opinion may aid the Collector, the latter only is the primary judge or assessor.

These two distinctive factors are as severable in administration and commercial usage as they are and always have been by statute. Successive Congresses have legislated respecting them, always treating each factor with separate distinction. The latest law (Tariff of 1883) modifies the first factor in certain described cases (*i. e.*, where cost of production is to be ascertained), and abolishes the second factor by repealing Sec. 2907, U. S. R. S.

Together these two factors prescribed the *dutiable* value upon which the *ad valorem* was to be rated.

At the time of the importations in controversy, among other sections of the U. S. Revised Statutes, were in force:

"SEC. 2906. When an *ad valorem* rate of duty is imposed on any imported merchandise, or when the duty imposed shall be regulated by, or directed to be estimated or based upon the value of the square yard, or of any specified quantity or parcel of such merchandise, the collector within whose district the same shall be imported or entered shall cause the actunl market value, or *whole-*

sale price thereof, at the period of the exportation to the United States, in the principal markets of the country from which the same has been imported, to be appraised, and such appraised value shall be considered the value upon which duty shall be assessed."

SEC. 2907. In determining the *dutiable* value of merchandise, there shall be *added to* the cost or to the actual wholesale price or general market value at the time and place of exportation in the principal markets of the country from whence the same has been imported into the United States, the cost of transportation, shipment and trans shipment, with all the expenses included, from the place of growth, production or manufacture, whether by land or water, to the vessel in which shipment is made to the United States; the value of the sack, box or covering of any kind in which such merchandise is contained; commission at the usual rates, but in no case less than two and one-half per cent.; and brokerage, export duty, and *all other actual or usual charges* for putting up, *preparing and packing* for transportation or shipment. All charges of a general character incurred in the purchase of a general invoice shall be distributed *pro rata* among all parts of such invoice; and every part thereof charged with duties, based on value, shall be advanced according to its proportion, and all wines or other articles paying specific duty by grades shall be graded and pay duty according to the actual value so determined.

Concerning the first factor of dutiable value, described in Sec. 2906, and which alone is made the subject of appraisement, Congress has extensively legislated, but to no purpose if its enactments are not to be observed and enforced through the aid of the judiciary.

Thus it is made the duty of appraisers "by all reasonable ways and means" to appraise "the true and actual market value and wholesale price in the principle markets of the country from whence exported," etc. (U. S. R. S., Secs. 2902, 2952). But in so doing certain laws must be observed. Thus, the *ad valorem* duty shall be levied upon the above-described market value on the day of actual shipment, as shown by a certified bill of lading* when presented (Sec. 2904); and upon merchandise imported from a country in which it has not been manufactured upon the price of similar articles in the country of manufacture at the period of exportation to the United States (Sec. 2905); and when duty is imposed according

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* This bill of lading is not permitted to be seen by the appraisers, but is attached to the entry, and importer's oath, which in practice is withheld from the appraisers' inspection!

to the value of a specified quantity or parcel, the appraisement must be at the wholesale price in the principle markets of the country from which the same has been imported (Sec. 2906); and in determining such values the cost of transportation, packing and certain charges were formerly added (Sec. 2907), while now they are no longer added, but should not be included (Tariff Act, 1883); and when there is expressed an average price in an invoice the duty shall be assessed upon the whole invoice according to its highest item (Sec. 2910); and the best article in wool cases fixes the value (Sec. 2911); and the wool of best quality carries up the duty of its fellow-wool (Sec. 2912); and no discrimination as to trade-marks shall be made between kid gloves (Sec. 2913). Standards of weights for bushels of various grains are established, by which appraisers must be governed (Sec. 2919), and the right given to summon owners and others and their books and papers to testify touching dutiable value (Sec. 2922); under penalties and "conclusive" appraisements for refusal (Secs. 2923, 2924).

The damage also to imported goods is to be appraised according to prescribed methods (Sec. 2927).

Should any of these provisions, applicable in any given case, not be pursued, by so much is the procedure illegal.

As Congress did not intend that any of these provisions should become nugatory at the wish of any official, so it did not intend that by appraisement, or its omission, the "charges" described in Section 2907 should be enlarged, doubled or avoided; but that the *law* stated *should apply to the facts* of each importation.

If this were not so the repeal, in 1883, of Section 2907, was futile legislation; for the imposition of the repealed charges would be inscrutible if exclusively determined by appraisement. Indeed, notwithstanding the decisions of this Court to the contrary, this conclusiveness is boldly claimed by the Government, as well in the case at bar as in current administration, as will be seen from the papers cited in the Appendix to this brief. The defendant in error assumes, however, that the Courts will give effect to legislation in any case properly before them.

The true *legal duty* then *depends on the facts,* which are provable; and upon the judicial application of the statutes to the facts.

2. Of course the most expert arithmetician would be unable to differentiate a total sum into its component factors of (*a*) "wholesale price," and (*b*) "charges added" thereto, unless given one of such component factors or some method by which one of such factors might be ascertained.

If there be added to the wholesale foreign price (the first described factor) all the *actual* charges mentioned in the second described factor (Sec. 2907) there is no justification in again *re*-adding the latter, no matter what officer may assume to do so, or to set up his *opinion* against the *actual facts* of the case.

It seems too simple to argue the proposition that in order to ascertain the "charges" upon which duty was paid the price of the merchandise must first be deducted from the total amount upon which duty was paid. This is the first essential step; and without it any fixity or limitable controversy in respect to "charges" would be impossible. Reduced algebraically the case may be thus simplified: If $a + b = x$, or the amount upon which duty is to be rated, then $a = x - b$, or $b = x - a$.

Either result postulates this case. In any event a must be arrived at according to law, and b must be arrived at according to law. Nothing included within a can be included again within b; and nothing included within b can again be included within a. It needs no mathematical demonstration, therefore, to exhibit the necessity of ascertaining in this case what was the foreign price of the merchandise exclusive of any charges which the law then required the Collector to add to that price.

The *trial* below *concerned these additions* only, and the starting point of foreign price was absolutely essen-

tial to any inquiry. Fortunately this price was not in this case a complex question. Its totality seemed to be agreed upon by all the witnesses upon agreed conditions, chief among which was that of location of principal market and ship-loading facilities. The labor and expenses of ship-loading it was agreed formed no feature of the market price; and hence must be separately ascertained; but if the location of the market was at a distant point the expenses to the place of shipment would obviously not be comprehended within that market price. To this extent at least that market price and place was an essential fact upon which the rights of the parties and the operations of the statutes might depend. To state the proposition, therefore, that some official certificate of vague and irresponsible character or some appraiser's unwritten opinion shall preclude the judiciary from dissecting the facts, would seem to furnish its own answer.

The common sense of the matter would seem to be aptly expressed by the learned Judge below when he told the jury that if "*Aspinwall was the only market of the country and the market price there would always include the charges for bringing the bananas there, then the charges would be in once and should not be put in again.*" (Rec., fol. 90).

Thus is tersely but comprehensively stated the issue and the law of the case.

3. Of course under these circumstances the actual location of the principal market of the country had to be fixed; and upon this the testimony did not have the slightest doubt, nor was there any document produced recording any official connected with the assessment as fixing the market at any place except Aspinwall. The case in this respect shows absolutely nothing except the call by the Government as its witness of one assistant appraiser (Rec., fol. 57), "that Aspinwall was not considered by the appraiser" to be the principal market of the country, but "only a port of shipment;'

and that "no particular place was taken as the principal market of the country."

The existence of this testimony is the only ground exhibited, in the record giving shadow to the Government claim that proof could not be properly received that Aspinwall was the principal market of the country. It is a novel proposition of law that the vague testimony of one official destroys the positive affirmative testimony of numerous witnesses in opposition to him, and renders an issue of fact in this respect impossible. The Government below indeed claimed that the Court should adopt the uncertain testimony of this one witness as the controlling proposition of law for the case; and thus shut the doors to further inquiry. In the face of the facts that Aspinwall was the only place of importance or where there were banks, exchanges, mercantile bodies or places of general commercial transactions, and where merchants had consummated their dealings, the Government attempted by specious assumption to remove commercial transactions, the most extensive of their character on the Isthmus, from the only possible market to unidentified plantations. With as great propriety it might claim by official fiat to locate the principal market of the United States of Colombia at a particular banana bush.

The case relied upon for this extremity will be found quite inadequate. That case (Stairs vs. Peaslee, 18 How., 521) arose upon a certificate of divided opinion as to whether in a particular case of importation from Halifax under a peculiar state of facts Calcutta, Liverpool or Halifax should be regarded as the principal market *of the country* of production, and the real question was what meaning should be given to the word "*country;*" did it include all its posessions or only the dominion of last shipment. As the "country" was held to signify *nation* or *government*, and as both Calcutta and Liverpool were in fact principal British markets for the commodity in question, *this Court simply declined to*

decide as matter of law what place constituted the principal market for that particular assessment, and refused to disturb the appraiser's certificate, embodied in the agreed facts, that Liverpool was the standard for market value in that case.

Even if this case had arisen under the same statutes, as it did not, it is therefore without authority to sustain the Government's position in the case at bar.

II.

What constitutes foreign market value for duty purposes as from time to time regulated by acts of Congress, has repeatedly been a subject of judicial determination.

The books are replete with adjudications applying the statutes to various conditions dependent upon the provisions in force at the time of the transactions under investigation. Adjudications of this character could not have occurred if it were true that the decision of a customs officer as to the compliance or non-compliance with the provisions of law were binding upon the courts, as contended by the Government on the trial of the case at bar. As the factors of market value are prescribed by statute, so the elements comprising these factors consist of facts capable of proof. If improper elements have been entertained in arriving at *dutiable* value, the result when before the courts has been vitiated; and the illegalities have been specified and eliminated by judicial determination.

The leading case upon this subject of recent date is the case of Oberteuffer against Robertson, 116 U. S. R., 499. It is true that this case arose after the Tariff Act

of 1883 had abolished duties upon the "charges" prescribed by Section 2907, U. S. R. S.; but that circumstance does not any the less render the case an authority as applicable to a state of facts where it is claimed the charges have been *twice* superimposed; or where charges *not in any wise authorized by law* have been erroneously added by the customs officers to the amount upon which the *ad valorem* was rated. In that case, as in the case at bar, the Government contended that the appraisemet of the alleged erroneous charges was conclusive, and that the remedy of dissatisfied importers was to seek a reappraisement. This Court, at p. 515 says: "It is contended for the Government that a reappraisement should have been applied for by the plaintiffs under Section 2930 of the Revised Statutes, and that they mistook their remedy. We are of opinion that this is not a sound view. * * * The *addition of the items for cartons and packing was no part of of the duty or function of the appraiser* acting under Section 2906 to appraise the foreign market value of the goods. Although in form the appraiser added the items for cartons and packing, the action of the Custom House was only a decision of the Collector under Section 2931, that the cartons and packing were duitable costs and charges."

So in the case at bar, it was "*no part of the duty or function of the appraiser*," in appraising the foreign market value of the bananas, to add to that value any sum in excess of the *actual* charges for shipping, etc., at the place of exportation. Even if he in form did add them, the action of the Custom House was only a decision of the Collector that the charges thus added were dutiable under the statute.

Moreover, when the Collector read on the importers invoices and entries presented to him that these illegal shipping and transportation "charges" were "added as required by the appraiser" (see Rec., fol. 45), the Collector immediately decided to exact and then and

there did exact the duty upon them. Without depositing the duty so ordered the entry conld not be passed and permit given to land. *The collector being fully informed thus adopted the appraiser's requirements, whereas he might have deferred taking the questionable duty upon the additions "required by the appraiser" until their propriety could be tested. He had custody of the bananas and exacted and received duty upon the illegal additions "required by the appraiser."*

Now, in fact, the charges thus added could not be dutiable twice ; and if duty had been already assessed upon them in the *price* and *charges* previously specified on the invoice and entry (see Rec., p. 17), before him, the action of the Collector in assessing duty upon them a second time was a decision under Section 2931 that properly became the subject of further inquiry. This was the inuqiry made by the Court and jury in the case at bar. The result of this inquiry depended (1) upon the proofs, in the reception of which defendants in error contended there was no mistake of law; and (2) upon the charge of the Court to the jury, which we contend properly stated the law that was applicable to those proofs.

The fact that excessive charges had been imposed was susceptible of proof and adjudication in the Oberteuffer case ; and upon the same principles similar facts in the case at bar call for a corresponding adjudication upon them.

Attempts have frequently been made by customs officials to preclude investigation by the Courts of exactions upon alleged improper "charges," but never with the approval of this Court, nor with the approval of the Circuit Courts in any reported case where the Court was convinced that the superimposed charge was an unwarrantable one. A recent instance in this Court is the case of Cusimano vs. Badger, 130 U. S. R., 39, where (as the result of a reappraisement) there was added to the actual foreign market value of the imported merchandise certain

alleged illegal charges. In that case, as in the case at bar, the Government contended that the appraisement was final and conclusive, and that evidence to impair it could not be received, and that the assessment upon the charges must therefore stand. This Court again held that the addition of illegal charges "entirely apart from any inquiry as to fraud in the appraisement *or as to the value set forth in it*, and may be raised by the importer in an action at law." The Court declared that the power of the Collector to add charges alleged to be illegal was an independent inquiry open to review in the Courts; and *the decision in the case is equivalent to the expression by this Court of its disapprobation of any method by which the statutes in respect to charges may be disregarded.*

The significance of the Cusimano case is in the determination by this Court that the *appraisement of charges is open to judicial inquiry.* As, of course, the law does not permit that to be done indirectly which if done directly would be obnoxious, so the law will not permit illegalities or violations of statutory provisions to be concealed under the alleged finality of an appraisement. Yet the gist of the controversy represented by this case is the contention on the part of the Government that its customs appraisers may themselves determine to the exclusion of the Courts, what charges shall, and the extent thereof, and what charges shall not, be made the subject of duty. As the Government witness put it in the case at bar, he assured the importer "that such charges were dutiable under the statute;" and having this conviction, he included them in his appraisement; or, what perhaps amounted to the same thing, he declared the so-called foreign market value of the goods upon the basis of including them.

The appraiser's ambiguous certificate upon the invoices was "value correct with importer's additions" (Rec., p. 17). If the "*value*" was correct the "import-

er's additions" formed no part of it; for the invoice "*value*" was stated at 60 and 30 cents per bunch. The propriety of the *additions* was still in any case within the province of the Collector, and he retained all the money he had already exacted upon those additions.

The right to dissect the appraiser's return of "value correct with importers' additions," and to ascertain its meaning, and the existence of the improper items in the total amounts upon which the resulting duty was exacted, paid and withheld, was the right asserted by the plaintiffs in the case at bar, and upheld by the Court and jury in the trial below.

III.

Some Illustrative Cases.

The following are some illustrations of the applications of similar principles: In the case of James Benkard and another against Schell, Collector, tried in the United States Circuit Court, New York, in 1866 (fully reported only in the pamphlet of the case, prepared and printed by the United States Attorney), the plaintiffs claimed that they were compelled to pay duty upon an arbitrary sum added for costs and charges, and that they paid under protest and submitted to such arbitrary additions only under coercion. The Government resisted the recovery, claiming the additions to be proper and legal.

Judge SMALLEY, in his charge of the jury, after reviewing the course of adjudications and of Treasury instructions, held that certain of the charges so added were illegal, being in excess of the actual charges (in which decision the Treasury Department subsequently concurred). The Government further claimed, as in

the case at bar, "that the additions to these entries were the acts of the plaintiffs, and in consequence that the payment of the duties thereon was volnntary, and, therefore, that the plaintiffs should not recover;" and on this point the Court charged the jury as follows:

"That is, to a certain extent, a question of fact which will be submitted to the jury. If, however, the evidence of the plaintiff and of his Custom-house clerk be true, if the jury give it credence, taking it in connection with some further testimony which has been offered this morning—if the jury give credence to their statement, that when they made those entries they were told by the entry clerk of the Custom-house that they must make these additions or they would not receive the entry, and that they acted under these instructions for the purpose of obtaining possession of their goods, making a protest at the time, and saying that it was added by compulsion, then that was not the voluntary act of the merchant. In one sense it might be called, perhaps, the act of the Collector; but we cannot call that the act of the merchant, which was done under what might be called legal duress—so far as the word "duress" can properly be applied to property instead of to persons, which is not a strictly proper application of the term, although other Courts have used it before. This is a question of fact which will be submitted to the jury, and if they find these facts they will be told that this objection also is of no avail.

Another objection to the recovery in this case is that the action of the appraisers was conclusive, and that the Collector was by law bound to collect the duty on the amount returned by them. Without going into any elaborate discussion of the principles which might be involved in that proposition, it is sufficient to say that, in this case, if this act of the plaintiff was based upon a compulsory act of the Collector, if the plaintiff put the entries in there to obtain possession of the goods, and protested at the time, saying that they were illegal, but if he put the additions on because they would not otherwise pass the entry, if that was the foundation of it, this, too, falls to the ground. The original wrong was in the Collector or his agent; and he cannot now turn round and say, "I forced you to put it on, else I would not let you have your goods"—

the English of it would be this—"but when it was put on, it went into the hands of the appraisers, and the appraisers accepted it and made no change; and when it came back I was bound to exact the duty; and now I will not pay it back to you because you put it on there!" How came he to put it on there? It comes back to that question.

In this position is the objection which has been practically offered here this morning, by the evidence, that the Collector is not liable for the action of his Entry Clerk. The statement of Mr. Schell, as to what he thought would be done, is a matter of no consequence here. Mr. Schell stated that he gave no instructions to the Entry Clerk, other than to enter the goods according to law and the Treasury Regulations, and he does not think they used any compulsion in this case; but that is not evidence. No one doubts that the statement of Mr. Schell is strictly true, that his instructions to all his clerks were to perform their duties according to law, or the Treasury Regulations emanating from his superior, the Treasury Department. It is now claimed in his behalf, by the Counsel for the Government, that the Entry Clerk did that without his authority, and that, therefore, although it was an official act, he was not bound by it.

Probably there have been thousands of these cases tried in this and other places within the last twenty years. I presume this is the first time this objection was ever made, and I cannot regard it with favor now. It must be overruled.

Let us look for a moment. Suppose this principle was admitted to be sound, what would be the position of the merchant? He goes to the proper officer. The immense business of the Custom House must be divided among various branches, each having a separate and distinct head, and having clerks under them. This is a necessity. The Custom House here is a large part of the Treasury Department—Sub-Treasury Department of itself The merchant goes to the Entry Clerk, and is told: "I cannot take your entry here unless you make certain additions to it." But he replies: I do not consider these right; I will not make them; I did not pay these charges; it is a violation of the law to require me to make them. "Well, I shall not take your entry unless you do." There stands his cargo of goods, liable to injury or destruction; he cannot litigate

the question then, and he says : " I will put it on ; but at the same time I will tell you why I put it on—that it is because you compel me to do it," and he protests at the very moment. He writes upon the entries " by compulsion," and he leaves with the entries a protest that he makes the addition because he is compelled to do it in order to get possession of his goods ; that it is illegal, and that he intends to get it back if the law will sustain him. That is the English of it, without going through it further.

This would leave the merchant at the mercy of every little entry clerk, if he alone was responsible—the clerk here to-day and there to-morrow. The gross injustice which is manifest in the practical operation of this principle is sufficient to show that it cannot be founded in law. The law has sometimes been said to be the perfection of human reason. There is reason in law—it is the spirit of it. But I do not think there is any reason by which such a principle could be maintained.

It is true that Mr. Schell gave his officers most explicit instructions to act according to law, but it is equally true that he says he knew they were making these exactions. He supposed, probably, that it was according to law. No doubt he did or he would not have done it. And if he knew it, and the money went into his hands, on another principle he would be liable. I refer to the old rule, *qui facit per alium facit per se*, which applies here most emphatically. So that I think this objection is without any foundation.

It would hardly do when money has been illegally exacted by an officer under Mr. Schell's control, and paid by him into the Treasury (whatever the rule was before, Mr. Schell is personally protected now), it would hardly do to turn round and tell the importers that they must look up the entry clerk who, when found, might not be responsible."

The verdict under this charge has been accepted by ths Government, and the case has uniformly been recognized as stating the law applicable to the subject.

Of the many reported cases involving an inquiry respecting the validity of assessments and the alleged finality of appraisers' conclusions below are some of the

instances of recoveries because the appraisers disregarded statutory rules.

In *Burgess vs. Converse*, 2 Curtiss, C. C., 221-2, Judge CURTISS observed: "It was not intended or designed by Congress merely to protect the revenue by preventing under-valuation." They meant also to protect the fair trader against over valuation. * * * "It was argued that the appraisers themselves were the judges, what examination was necessary," etc. * * * "This would be true if the law prescribed no rule on the subject."

In *Greeley vs. Burgess*, 18 Howard, 415-6, the Collector claimed to exclude evidence impairing the decision of the appraisers and that the latter was in the nature of an award and final under the statute. The Court said: "These acts of Congress provide for the appointment, regulate the duties and impose the limitations on the authority of the appraisers, and determine the conditions on which the validity of their assessment depends. All their powers are derived from these acts, and it is their duty to observe the restriction and to obey the directions they contain." * * * We are, therefore, of the opinion that the importer was not precluded by their return from disputing the sufficiency or accuracy of their assessment; which he did successfully in that case.

In several cases in the Circuit Court at New York a recovery was had because of the unauthorized addition of "charges" by the appraiser.

In *Grinnell vs. Lawrence*, 1 Blatchford, 346, a certain freight charge was held unauthorized under the enactments applicable to the importation in question; and if was further held that *even if this freight were a proper charge it would form no part of the appraised value of the goods.*

In *Griswold vs. Lawrence*, 1 Blatchford, 591, where the customs officials insisted upon an erroneous period of time which should form the basis of the valuation,

it was held that the addition compulsorily made as the result of that error might become the subject of protest and recovery.

This principle was expressly approved by this Court in *Maxwell vs. Griswold*, 10 Howard, 242. In the latter case the importer had put in his invoice the price actually paid for the goods with charges, and proposed to enter them at the value thus fixed. The Collector caused an appraisement to be made on an erroneous basis as to the period of valuation, and an increase of duties resulted for which the action was instituted. The Government insisted that the excess of duties was paid voluntarily, and hence, though illegal, cannot be recovered back. The importer knowing (as in the case at bar) that unless he complied with the requirements of the customs officials he would be subjected to a severe penalty, and in order to avoid it was compelled to add to his invoice in accordance with the demands of the Customs House. This Court said: "This addition and consequent payment of the higher duties were so far from voluntary in him that he accompanied them with remonstrances against being thus coerced to do the act in order to escape a greater evil, and accompanied the payment with a protest against the legality of the course pursued towards him. Now, it can hardly be meant in this class of cases that to make a payment involuntary it should be by actual violence or any physical duress. It suffices if the payment is caused on the one part by an illegal demand and made on the other part reluctantly and in consequence of that illegality, and without being able to regain possession of his property except by submitting to the payment. All these requisites existed here. We have already decided that the demand for such an increased appraisal was illegal. The appraisement itself as made was illegal. The raising of the invoice was thus caused by these illegalities in order to escape a greater burden in the penalty. The payment of the increased duties thus

caused was wrongfully imposed on the importer and was submitted to merely as a choice of evils. He was unwilling to pay either the excess of duty or the penalty, and must be considered, therefore, as forced into one or the other by the Collector *colore officii* through the invalid and illegal course pursued in having the appraisal made of the value of the *wrong period.* * * * THE MONEY WAS THUS OBTAINED BY A MORAL DURESS NOT JUSTIFIED BY LAW, and which was not submitted to by the importer except to regain possession of his property already withheld from him on grounds manifestly wrong. Indeed, it seems sufficient to sustain the action whether under the act of February 26, 1845 (U. S. R. S., Section 3011) or under *principles of the common law*, if the duties exacted were not legal and were demanded and were paid under protest." These principles have never yet been repudiated by this Court, or intruded upon by any Act of Congress.

There would seem to be no difference in principle between this declaration of the Supreme Court in 1850 and the charge to the jury in the case at bar. An appraisal made of a *value* at the *wrong place* would seem to be as important and illegal as an appraisal made of a value at the *wrong period.*

The principles declared in the last cited case have been expressly reaffirmed here in Swift Co. vs. U. S., 111 U. S., p. 29, where, in the opinion of Mr. Justice MATTHEWS, English and American cases are cited. One was a case where money was paid in excess of what was due in order to prevent a threatened sale "The interest of the plaintiff to prevent a sale by submitting to the demand was so great that it may well be said the payment was made under what the law calls a species of duress." So payments to a common carrier to induce him to do what he is legally bound to do were declared not voluntary. So illegal fees paid to a collector, in accordance with a long continued practice, under a mistaken construction of statute, were not

voluntary, but were compulsory and recoverable (Ogden vs. Maxwell, 3 Bl., 319). "If a person illegally claims a fee *colore officii* the payment is not voluntary, so as to preclude a party from recovering it back." This Court in the Swift case approves these authorities and declares that "to make the payment a voluntary one, the parties should stand upon an equal footing."

Other instances of erroneous "charges" attempted to be imposed as the result of appraisements are:

Vaccari vs. Maxwell, 3 Blatchford, 368, where the appraisers added an illegal charge for certain freight not dutiable, and the basis of the duties was therefore without authority, and plaintiffs recovered. Griswold vs. Maxwell, 3 Blatchford, 145, a similar case. See also Maillard vs. Lawrence, 3 Blatchford, 379, and Tucker vs. Kane, Tauney, 146; and for a case where an appraisement was made upon an erroneous basis in arriving at the valuation and was held not conclusive on the importer as to the dutiable value of the goods (Lowenstein vs. Maxwell, 2 Blatchford, 401).

See also *Gant vs. Peaslee, 2 Curtis Cir. Ct., 250*, where CURTIS, J., said:

"The argument on the part of the Collector is that the Act of 1851 has made it the duty of the Collector to ascertain the market value at the period of the exportation to the United States in the principal markets of the country from which the same shall have been imported into the United States, and to add thereto all costs and charges; that in this case England was the country from whence the figs were exported into the United States; that consequently their market value there, and the costs and charges there, were to be ascertained; that if it was not lawful to add the cost of freight from Smyrna to Liverpool as one of the costs or charges, yet that the expense of bringing the figs to England must have embraced their value in Liverpool, and that it is immaterial to the plaintiff whether that expense goes into the dutiable value in the form of costs or charges on the figs or as part of their market value in Liverpool. This is an ingenious view of the defendant's case, and seems to be the best which it admits of, but I am of opinion it is not consistent with the law.

If it were conceded that, in this case, England was the country of exportation, it could not be maintained that the freight paid for

carrying the figs to England was one of the costs or charges within the meaning of this Act of 1851, because in that case the act requires the market value in England to be ascertained, and the costs and charges added. *Now, the cost of carrying the figs to England necessarily enters into and affects their market value in England, and is included when that market value is ascertained, and, of course, is not to be again added as one of the costs or charges.* Besides, there is no legitimate mode of ascertaining the amount of such a charge. No freight was agreed on in this case for transporting the property from Smyrna to Liverpool. The actual freight was paid for the transportation to the United States, and when the Collector added £3 per ton for freight to Liverpool, he did not add an actual charge paid by the importer, but a supposed sum, estimated by himself as being what it would have cost to carry the property to Liverpool, if that had been, as it was not, its place of destination.

Nor can it be admitted that the other position is tenable, that the market value in England being the object of inquiry, it is immaterial whether the cost of carrying the property there is included in that market value or is added to the invoice in order to ascertain it. It is obviously true that the cost of carrying the property to England enters into and affects its market value in that country. But if by no means follows, that at any given date, this cost of transportation enhances the value precisely to the amount of the freight. Market value is affected by many causes, the chief of which is supposed to be the extent of the supply compared with the demand ; and it is plain that *to take the invoice cost and charges at Smyrna, and add to them the cost of transportation to Liverpool, would not be a legitimate mode of ascertaining the market value of figs in Liverpool.* So that, conceding England to be the country whence the figs were exported to the United States, the market value there was not ascertained, not attempted to be ascertained. The Collector undoubtedly treated the market value in Smyrna, as shown by the invoice, to be the true market value, and added £3 per ton, as one of the charges or costs at Liverpool, which was the last port of departure to the United States."

In *Millar vs. Millar*, *2 Curt., 256*, CURTIS, J., said: "But for the reasons given in Gant's case I consider that the camphor was purchased by the plaintiffs in Canton for importation into the United States, and went to Manilla into the hands of plaintiffs' agents there merely to be forwarded to the United States; that *Canton* and not *Manilla* was the place whence it was imported into the United States." A charge had been made and duty paid on freight from Canton to Manilla.

So in the case at bar, Aspinwall was the standard place.

In *Belmont vs. Lawrence*, 3 Blatch., 120, it was said

that if the fact had been made known to the appraisers that the quicksilver was the product of Spain, their erroneous adoption of the London market value, as the basis of assessment, would have been reviewable upon protest, *i. e.*, if they disobey the law, their action will be reversed by the Court.

United States vs. 12 cases Cudbear, Gilp., 507, was where the appraiser had put on 8½ pence against an invoice of 6 pence, and reappraiser (under Act of 1830), had put on 10 pence. It turned out that one of the reappraisers had made a mistake in appraising the article as a good quality instead of a very inferior quality which it was, and a quality of which he had no knowledge whatever, and which he thought had no market value at all, instead of such value as he had mistakenly estimated and appraised it at. So there was a verdict for defendant notwithstanding the appraisement, there having been no undervaluation by the importers, an impossible result it the appraisers' valuation had been held conclusive.

See also *United States vs. Clements*, Crabbe, 512, where RANDALL, J., said :

" That the term *ad valorem*, as mentioned in the various revenue laws of the United States, charging a duty on imports, does not *always* mean the *actual* value of the article at the place of exportation, is evident from an examination of some of the acts.

The Act of 1818, Section 4 (3 Story, 1680), directs that *ad valorem* rates of duty shall be estimated by *adding* twenty per cent. to the *actual cost* thereof, if imported from or beyond the Cape of Good Hope, and ten per cent. on the actual cost if imported from any other place, including all charges, except commission *outside packages*, and insurance. The Acts of 1823, Section 5 (3 Story, 1884), and of 1828 (4 Story, 2117), provide that to the actual cost or value the same percentage shall be added and as to the charges only excepts that of insurance. The Act of 1832, Section 15, directs that to the actual costs or value all charges except insurance shall be added, but Section 4 abolishes the addition of ten and twenty per cent. * * * " *If* you are satisfied that a *duty* was *charged on* the *boxes* or hogsheads *over* and above *the value* of the sugar or molasses, at the time and place of exportation, and that such excess was paid by the defendants, they at the same time *protesting* or complaining *against* the justness or *legality* of the demand, that they are entitled to deduct the amount of such excess from the sum claimed."

IV.

On general principles it would seem to be futile for Congress to prescribe standards for appraisements, and upon which an *ad valorem* total shall be rated, unless it be within the province of the Courts to apply the statutory provisions to the facts shown in any particular case.

In the case at bar the proofs seem incontrovertible and certainly justify the jury in declaring as they did by their verdict, that there had been added to the actual foreign wholesale price greater sums for charges than were actually incurred by the plaintiffs, and that duty had been paid upon such excessive additions, and that such additions were no part of the foreign wholesale price or value; and that duty upon such additions is defended by official *opinions* that such charges were more or less included in what was styled foreign market value, although the proofs were clear that the foreign market value or wholesale price did not include them. This being the gist of the case, and the imposition for duty in these respects being unwarranted by any statute, the illegality represented by the verdict seems clear and without reason for disturbance by this Court. Indeed, the defendants in error confidently submit that this Court will not disturb the result unless it be prepared to declare that the appraisers' acts or opinions, no matter upon what erroneous basis they may be founded, are incapable of judicial scrutiny.

As to the fact of involuntary payment and compulsion of the importers to do what they did do in order to get their goods, it needs only the suggestion of the perishable cargo to fortify the conclusion that the importers must necessarily either have abandoned their cargo or to have submitted to any and every exaction imposed by the customs officials before unloading and distributing it to their consumers. It was not a question

of methods but of doing or not doing. It was all compulsion and a choice of payment of anything demanded or loss of the bananas. As the testimony shows, there was no other way of conducting their business except to do as they did do. The proofs bring the case entirely within the principles above quoted as repeatedly declared by this and other courts.

V.

The Defense of the Government

has ceased to relate to the *merits* of the obnoxious additions complained of. Indeed, the Government concedes by its silence upon them that the additions themselves were unmeritorious and unwarrantable. It is sought to defend them, however, against judicial scrutiny because (1) there was no coercion (?); and (2) if there was coercion that the official edict of the appraisers in respect to these additions is binding upon the courts. The fallacy of this last proposition has already been shown. The error of fact embraced in the first proposition is disclosed in the record. Moreover, it requires imagination to conclude that the average importer, however honest may be his intentions, will voluntarily part with more money than he need to in paying his taxes. In the nature of things he adapts himself and his dealings to the exigencies of official demands which he is in no position to resist. In truth the *involuntary character* of the transactions on the part of the importers is evinced in every step as well as in the intrinsic nature of the Custom House transactions. This Court has said: "To consider the coercion or duress which will be required as sufficient

to make a payment involuntary, there must be some actual or threatened exercise of power possessed or to be possessed by the party exacting or receiving the payment over the person or property of another from which the latter has no other means of immediate relief than by making the payment" (98 U. S., 213). Now in this case the importers' invoice showed the actual "charges" (see Rec., p. 17). What was added thereto was plainly described thereon as "shipping charges added as *required by the appraiser* to make five cents Columbian currency per bunch," and "transportation charges added as *required by the appraiser* on .... bunches at 25 cents.....small bunches at 12½ cents." Here was a notification to the collector of an unacquiesced requirement, and of an item upon which he had no right to exact duty. But he did exact duty at once, and he required the deposit of the usual estimated and primarliy liquidated duties on the bases of this transaction before permitting the merchandise to be landed. By the Treasury Regulations, Article 340, "duties will be estimated upon the entries according to the invoice and will be collected before the delivery of the merchandise." * * * "Any excess of deposit found to be due the importer must be paid to him * * * by the collector."

In the case at bar the collector was in no position to claim that the importer voluntarily pursued the course he did unless he, the collector, had refrained, as meritoriously he should have done, from exacting the payment upon the compulsory addition which the face of the papers exhibited. Had the collector refrained from such exaction and issued, as he could have done, the statutory permit to land and deliver the goods (U. S. Treasury Reg., Art. 341) and at some future day had received a voluntary payment of the exaction in controversy, then the Collector might perhaps be in a position to avail himself of the defense of voluntary payment—although even in such a case

the right to sue may be preserved by the statutory protest. But in the face of the character of the business of the Custom House and the statute and regulations applicable to the transaction of admitting goods to entry and receiving estimated duties, the importer is without any option whatever except to yield to any and every official demand, or to allow his perishable goods to waste away and himself to be bankrupted. In this case the importer told the Collector in writing that his subordinates required additions. Besides, the importer knew the fact to be that without he made the additions as required the Collector not only threatened but had exerted his power of coercing him to the extent of "double or treble" payments. The proof of this was ample. The witness said, "we had a number of entries prior to this litigation here going on; we thought that we would test our original mode of entry, but the consequence was that such a heavy amount of damages, or rather heavy amount of penalty was added on the invoice that *it would have ruined us in less than no time. We were therefore compelled to make these additions under protest. Q. In order to get your invoices passed? A. Yes, sir.* (Rec., fol. 48). * * * "Q. You say that he required you to make these additions to your entries? A. He did; if I did not make them he would add additional penalty." * * * Q. Did he tell you if you did not make these additions that he would add them for you and it would carry the penalty? A. Yes, sir; he did. He did so repeatedly. Q. And on those importations in which you have not made the additions he made them and the penalty was added? A. Yes, sir. Q. Of how much? A. Of considerable amount; double or thribble" (Rec., fol. 50). "There were certainly about twenty importations in question where he did make the addition and penalty for me. * * * Q. Did he make the additions for charges or for value? A. For charges; *there was no question of value*" (fol. 50). "I knew from the appraiser by con-

versation that unless I made the additions he would make them for me and add in addition a penalty. That is from what had taken place in other cases." * * * "I cannot point out any of the entries; I was constantly having this information and I desired to make it conform with his ideas on the subject." * * * Q. You have no reason to suppose that they would not have received your entry if it had not contained those charges? A. I don't suppose they would. * * * "When they (the invoices) were not made with these additions * * * there was a very great delay in liquidating, and consequently I intended to test these two; before the liquidation was made there was about five or six entries had rolled up, on which I was subjected to an additional penalty. I found myself so hopelessly handicapped I considered it was safer and better to come up to the conditions of the appraiser and protest and appeal. Q. You found there was no practical way by which you could test the right of authority to put those additions on and conduct your business at the same time? A. No, sir" (Rec., pp. 21, 22).

The intention with which an act was performed is generally accepted by courts as an *affair of fact*, and and not an inference of *law*, unless in very exceptional cases. This is not such a case. It would have been error for the Court to characterize the nature of the importers' acts, and the circumstances attending them, as in all respects *voluntary* under the circumstances of this case. If any isolated fragment of evidence can be discerned tending to show *voluntary* payment, and absence of any coercion, such evidence, under the charge of the Court, was submitted to the jury alongside of the abundant evidence exhibiting a moral and physical duress which, unless submitted to, amounted to a prohibition of the importing business of the plaintiffs, and a threat to repeat past penal exactions and to withhold plaintiffs' property for that purpose.

The quantity and quality of coercion depends upon the situation of the parties. They must stand upon an equal footing or, slight evidence of coercion will suffice to render the exaction an involuntary one.

When one party is an officer clothed with power to assess and to collect, while at the same time he withholds the private property of the other, coercion may be implied. Certainly, strong evidence would be required to convince the mind that the party submitting under such circumstances acted voluntarily.

At all events there was testimony sufficient to submit to the jury touching the involuntary character of the transaction; and the only issue in that respect before this Court is whether the Judge below fairly submitted that issue. What he said upon that subject was conspicuously favorable to the government's idea that there was something voluntary about the affair. The learned Judge declared:

"If those statements and figures were put on there because he (importer) thought that was the best way on the whole—if exercising his whole judgment freely he thought that it was the best way to get along with this to put it on there and let it go—he can't take it back. It must stand so. If he did it independently of the collector's department, on his own judgment, because he thought it was the best way to do it, let it stand; then he cannot recover anything back. The verdict will have to be for the defendant, any way; if that is so, because it was his own act in putting it on there. * * * If he was required to do it or given to understand by some officer in the collector's department that it would be the worse for him, seriously, if he did not; as, for instance, if the appraiser told him if he didn't put those on there the collector's office would, that the appraiser would, and that he would be exposed to a penalty that would be assessed against him; if he was given to understand by the Collector's department, or some officer of it, that if he did not put

these figures on there they should, and make it the worse for him because he did not, and he would thereby be exposed to a penalty of a larger duty which he would have to pay for not doing it, and he was in that way, for the sake of saving himself from the penalty which they would put upon him beyond what would otherwise be chargeable, induced to put them on—then he is not bound by it. That is, if they got him to put it on in that way, crowded him to put it on in that way, it was the same as if they themselves put it on. If they told him if he did not they should, then they can't say he did it independently; they procured it to be done. Therefore, for the purpose of the question now before us, it must stand the same as if he had left it off and they had put it on. So, in deciding the case which we have in hand you can look at that question if you choose to, and see if this was a voluntary thing which he decided in his own mind, that he had better put it on in that way, take this invoice and add what they claimed should be added and let it go. * * * But if you find he did not do it freely, then you can look further and see if there was anything put on there that ought to be. If he was compelled to do it, and it ought not to go on, and if he was, the plaintiffs are entitled to recover. And if you decide he was bound by putting that on, that will end the case; you must give a verdict for the defendant. If not, you may look and see if he was compelled to pay more than he ought, * * * and if so, find a verdict for the right amount."

An eminently fair submission. The defendant's exception to the definition of "compulsion" at page 45 of the Record is submitted as too vague and extensive to be of any avail on this writ of error.

It is submitted that the issues as to moral or physical duress, coercion, deposit or payment in order to get permit to land the goods (which is a statutory prerequisite) and altogether as to the involuntary character of the transaction in the light of all the circumstances

attendant upon the importers' acts, were fairly and properly submitted to and considered by the jury; and that nothing remains in that respect for the serious consideration of this Court.

VI.

In the light of the Government brief it is worthy of observation that this is a common law action, triable, after its removal by the defendant to the U. S. Courts, upon the same principles that would have obtained had the action remained in the Supreme Court of the State of New York. The fact that the Government adopts the defense and judgment and permits its officer to be sued, as the statute phrases it in "an action in the nature of an action at law, which shall be triable by jury" (U. S. R. S., 3011), does not change the common law principles upon which depend the rights of the parties as against each other. Congress has, however, in certain respects enlarged the plaintiff's common law rights by making it unnecessary for the importer to notify the Collector, by his protest, before the Collector shall turn the money into the Government Treasury. On the contrary, the Collector may and does part at once with the plaintiff's money, paying it into the Treasury, while the importer may withhold his notice of dissatisfaction until ten days after the result of extensive calculations (U. S. R. S., Sec. 2931).

This notice of protest, if thus seasonably made and seasonably followed by the statutory appeal and the institution of a suit at law, is thus made to relate back in point of time to the exaction complained of. The protest then attaches at once, and becomes in law co-

incident with the payment protested against. The fair construction of the enactments upon this subject is, therefore, that *payments made under protest are to be treated by the Courts, in cases of this character, as payments involuntarily made.* Duty payments are always made to obtain possession of goods, if the Collector does his duty according to the statutes, which is always the primary presumption.

This cause, therefore, presents no fair issue involving a voluntary exaction or estoppel, and the contentions of the Government in this respect should not be received with favor.

HENRY EDWIN TREMAIN,
MASON W. TYLER,
W. B. COUGHTRY,
For Defendants in Error.

APPENDIX.

EXTRACTS FROM TREASURY RULINGS.

Under date of September 29th, 1887, the Secretary writes to the Collector of Customs, at New York, in deciding upon certain appeals from duty assessments cognate to those at bar: "From your report it appears that importers on entry *deducted all charges* specified in the invoices, and that *such deductions were disallowed by the appraiser, on the ground that the charges were not included in the price of the goods. The action of the appraiser was equivalent to an addition in each case to make market value,* and the appeals are therefore rejected. Respectfully yours, I. H. Maynard, Asst. Secretary."

(Hence instead of the statue, the appraiser's option determines whether in practice the importer shall pay duty or not on "charges."

Another ruling under date of February 27th, 1888, says:

"SIR: The Department is in receipt of your letter of the 18th ultimo transmitting appeals. * * * You report that the appellants at the time of entry deducted all charges specified upon the invoice; that no charges were stated on the entry; that on some of the invoices the appellants made additions 'to make market value' and the appraisers in some of these cases made further additions for the same purpose. That in one case the appraiser only made an addition 'to make market value,' and then, in all of these cases, duty was assessed on the appraised value and no appeal was taken to reappraisers under Section 2930, R. S. You also report that in one case the *appraiser disallowed a*

portion of the sum deducted for charges and made advances ' *to make market value*' ; that the appellants took an appeal to reappraisers who sustained the return of the appraiser upon which duty was assessed. * * * *That portion of the appeals, therefore, relating to charges, would seem to be without foundation.*"

Again, the Secretary, on February 1, 1887, ruled :

" SIR—The Department duly received your letter of December 5th last * * * The appraiser reports further that the *charges noted* at the foot of the invoices are *not considered as being included* in the price of the goods, and were not deducted by the appellants at the time of entry.* From this report it appears that duty was levied *per se*, and your assessment of duty without deduction for the charges is hereby affirmed. Respectfully yours, C. S. Fairchild, Asst. Secretary."

Also by Treasury Letter dated Dec. 8, 1887, he said :

" The Department is also in receipt of your letter of 22d ultimo, transmitting the following appeals from your alleged action in assessing duty on *certain so-called charges.* * * * It appears from your report that the *appraiser made certain additions to the entered value* of the goods covered by the above appeals '*to make market value (?)* of the goods *per se*,' and that the appellants took no appeal to re-appraisers against the adoption of such values as a basis for the assessment of duty. Such being the case, your decision is hereby affirmed."

By Treasury letter of November 8th, 1886, he said :

" You report that all the *charges* specified on the invoice were *deducted by the appellants* at the time of entry. If the charges specified either on the invoice or entry were included in the appraised value of the

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*Not deducted in such instances generally because the importers were aware that the appraisers would re-add them, and thus subject the importer to a penal duty.

goods the importers are entitled to relief, and you are authorized to readjust the entry and to take measures for refunding the duty on charges.

If the appraised value represented the value of the goods, per se, exclusive of charges, your assessment of duty is affirmed."

(When the latter question is answered by the appraiser in the affirmative, is the importer remediless when the *fact* is contrary to such answer?)

By Treasury letter dated June 1st, 1887, he said to the Collector:

You report that the *charges* specified on the invoice *were deducted* by the importers on entry; that *the additions* made by the appraiser *were* '*to make market value,*' and that the entry was reliquidated in August and the appeal duty deducted. In view of your report the claim of the appellants as to the assessment of duty *on charges* appears to have no foundation, and is, therefore, rejected."

By Treasury letter dated November 9, 1886, he likewise ruled:

" The Department is in receipt of your letter of the 16th ultimo. * * * It also appears that the *charges* specified in the invoices *were not included in the entered* value. *If they were not added by the appraiser,* WHICH IT IS UNDERSTOOD THEY WERE, *this claim is also without foundation,* and is, therefore, rejected."

(Here is evidence that the *Department knew that the appraisers did re-add the charges* notwithstanding the decision in the Oberteuffer case the previous winter.)

By Treasury letter dated August 12th, 1886, it was ruled:

" The Department is in receipt of your letter submitting a report on the following appeals. * * * From your report it appears that *no duty was assessed on charges.* * * * *such charges having been deducted* on entry and *additions made* by the importers *to make market value,* and subsequent additions made by the

appraiser for the same purpose. The claim of the appellants in that respect is, therefore, rejected."

(This was and is the common practice of importers who become informed of what action appraisers would take on their charges.)

By Treasury letter dated October 21st, 1886, it was ruled:

"The Department is in receipt of your letters of the 11th, 12th and 13th instants, submitting the *appeals* specified in the accompanying schedules *from* your alleged *assessment* of duties *on charges* on the merchandise embraced therein. From your reports, it appears that *no charges specified* in the invoice or entries *were included in the appraised value; (?)* but that in some instances *additions were made* to the entered value *by the appraiser to make market value. (?)* The proper remedy of the importers, in cases where such additions were made, consisted in an appeal for reappraisement of the value."

From these extracts of ruling by the Secretary of the Treasury upon contested "charges," it will be seen that by a species of official legerdemain, the "*charges*" which may prove to be undutiable are relegated into the unidentifiable total of so-called "market value;" so that the dissection of that "market value" shall be prohibited, and *duty meanwhile exacted on illegal charges concealed within that total.*

The *true* market value being ascertained, will disclose the fact that an illegal exaction has been added to that value. The actual charges in fact included within that true market value are, therefore, to be ascertained by proof in all proper cases. This proof must necessarily be comprehensive, and depend, like other proofs, upon the best evidence attainable. Such proofs would be worse than useless if limited to the appraisement itself,